U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 27 March 2007

Case No.: 2006-BLA-05096

In the Matter of:

R.F.,[1]
Claimant,

v.

HIGH RISE COAL CO., INC.,
Employer,

and

LIBERTY MUTUAL INSURANCE CO.,
Carrier,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Party-in-Interest.

APPEARANCES:

James D. Holliday, Esq.
For the claimant

Francesca Maggard, Esq.
For the employer/carrier

BEFORE: DONALD W. MOSSER
Administrative Law Judge

[1] In any Decision and Order issued by the U.S. Department of Labor in Black Lung cases after August 1, 2006, the claimant is referred to only by initials rather than by full name in the interest of protecting their privacy.

DECISION AND ORDER – AWARDING BENEFITS

This proceeding arises from a claim for benefits under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. § 901 *et seq.* (the "Act"). In a case involving a living coal miner, benefits are awarded to coal miners who are totally disabled due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a chronic dust disease of the lungs arising from coal mine employment. 20 C.F.R. § 718.201(a) (2005).

Following proper notice to all parties, a hearing was held on September 7, 2006, in London, Kentucky. The parties were given the opportunity to submit evidence at the hearing, and submit post-hearing briefs.[2] The findings of fact and conclusions of law that follow are based upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations. The Act's implementing regulations are located in Title 20 of the Code of Federal Regulations, and section numbers cited in this decision exclusively pertain to that title.

ISSUES

The following issues remain for resolution:

1. whether the claim was timely filed;

2. whether the claimant is a miner;

3. the length of his coal mine employment;

4. whether the named employer is the responsible operator;

5. whether the evidence establishes a mistake in a determination of fact within the meaning of Section 725.310;

6. whether the miner has pneumoconiosis as defined by the Act and regulations;

7. whether his pneumoconiosis arose out of coal mine employment;

8. whether he is totally disabled;

9. whether his disability is due to pneumoconiosis;

[2] References to DX, CX, EX and ALJX refer to the exhibits of the Director, claimant, employer and the administrative law judge, respectively. The transcript of the hearing is cited as "Tr." and by page number.

10. whether the responsible operator is liable for payment of medical treatment bills while modification is on appeal pursuant to Section 725.310; and,

11. the number of the claimant's dependents for purposes of augmentation of benefits.

(DX 93).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

The claimant testified at the hearing that he was born September 23, 1940, and he has been an underground coal miner all of his life. (Tr. 11). He claims twenty-six years of coal mine employment. (Tr. 11). His principal jobs as a coal miner included running a shuttle car, scoop, and roof bolt machine. (Tr. 12). He had to lift bags of rock dust weighing in excess of one hundred pounds. (Tr. 12). Currently, the miner is seeing Dr. Glen Baker for his pulmonary condition. Dr. Baker has prescribed the miner several medications for his breathing problems. The miner testified that his breathing problems are what keeps him from going back to sustain his usual coal mine work. Claimant is an ex-smoker with a twenty pack year smoking history. He stated that he has not smoked in five years. (Tr. 16).

The miner filed his initial claim for Black Lung Benefits on December 28, 1978. (DX 1, p. 82). This claim was denied by the District Director. On January 6, 1999, the miner filed a subsequent claim which was again denied by an administrative law judge on January 17, 2001. (DX 1, p. 1041, 81). This denial was affirmed by the Benefits Review Board on January 16, 2002. (DX 1, p. 8).

The miner filed his third claim for benefits on April 16, 2003. (DX 3). The District Director issued a Proposed Decision and Order awarding benefits on March 31, 2004. (DX 38). Employer's counsel advised the District Director by letter dated July 28, 2004 that the firm's records indicate a notice of appeal and request for hearing was filed on April 19, 2004, and attached a copy of that letter. (DX 42).

Claimant's counsel, by letter dated July 30, 2004, advised the District Director that the responsible operator's allegation that it timely appealed the Proposed Decision and Order essentially should not be accepted because there was no further documentation submitted to prove the allegations. (DX 43). On November 3, 2004, the District Director issued an Award of Benefits and explained in the cover letter that the responsible operator/carrier was "deemed to have accepted the Proposed Decision and Order" because a timely response to that decision had not been received. (DX 44).

On February 21, 2005, the employer requested a modification of the March 31, 2004 awarding of benefits by the District Director. (DX 54). The District Director denied the request on July 20, 2005. (DX 75). The employer timely appealed that decision and the claim was transferred to the Office of Administrative Law Judges on October 27, 2005. (DX 93).

Timeliness

Under Section 725.308(a), a claim of a living miner is timely filed if it is filed within three years after the miner is told he is totally disabled due to pneumoconiosis. A physician must render a well-reasoned diagnosis of total disability due to pneumoconiosis such that the report constitutes a "medical determination of total disability due to pneumoconiosis which has been communicated to the miner" under Section 725.308 of the regulations. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. The Sixth Circuit Court of Appeals has held that the three-year limitations clock begins to tick the first time that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and may only be turned back if the miner returns to the mines after a denial of benefits. *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608 (6th Cir. 2001).

Employer argues that the claim is not timely filed because Dr. Glenn Baker diagnosed the miner with pneumoconiosis and stated that he was totally disabled by the disease on January 22, 1999. (DX 1, p. 355). In a decision dated January 17, 2001, an administrative law judge reviewed Dr. Baker's 1999 medical report and found that the opinion was insufficient to outweigh other, better reasoned opinions that the miner did not suffer from pneumoconiosis. (DX 1, p. 96). Dr. Baker's opinion was not supported by the weight of the objective evidence. After reviewing Dr. Baker's medical report submitted in 1999, I agree with the assessment of the administrative law judge and find that the medical opinion was not well-reasoned and did not constitute notice to the miner that he was totally disabled due to pneumoconiosis. Therefore, I find that this claim was timely filed.

Status as a Miner

A prerequisite to establishing entitlement to benefits is proving that the claim is on behalf of a coal miner or a survivor of a coal miner. Section 725.202(a) provides a rebuttable presumption that certain individuals are miners, as follows:

> (a) Miner defined. A 'miner' for the purposes of this part is any person who works or has worked in or around a coal mine or coal preparation facility in the extraction, preparation, or transportation of coal, and any person who works or has worked in coal mine construction or maintenance in or around a coal mine or coal preparation facility. *There shall be a rebuttable presumption that any person working in or around a coal mine or coal preparation facility is a miner.* This presumption may be rebutted by proof that:
>
> > (1) The person was not engaged in the extraction, preparation, or transportation of coal while working at the mine site, or in maintenance or construction of the mine site; or
> >
> > (2) The individual was not regularly employed in or around a coal mine or coal preparation facility.

The claimant testified that he worked as an underground miner running a shuttle car and a roof bold machine. He gave similar information on his work history form. (Tr. 12; DX 5). Although the employer contested this issue, it has not presented any evidence or argument to rebut the presumption that the claimant was a miner. Therefore, I find that he was a miner within the meaning of the Act.

Coal Mine Employment

The duration of a miner's coal mine employment is relevant to the applicability of various statutory and regulatory presumptions. Claimant bears the burden of proof in establishing the length of his coal mine work. *See Shelesky v. Director, OWCP*, 7 BLR 1-34, 1-36 (1984); *Rennie v. U.S. Steel Corp.*, 1 BLR 1-859, 1-862 (1978). On his application for benefits, the claimant alleged thirty years of coal mine employment. (DX 4). The evidence in the record includes a Social Security Statement of Earnings encompassing the years 1960 to 1990, employment history forms, applications for benefits, and claimant's testimony. (DX 8, Tr. 11).

The Act fails to provide specific guidelines for computing the length of a miner's coal mine work. However, the Benefits Review Board consistently has held that a reasonable method of computation, supported by substantial evidence, is sufficient to sustain a finding concerning the length of coal mine employment. *See Croucher v. Director, OWCP*, 20 BLR 1-67, 1-72 (1996) (en banc)*; Dawson v. Old Ben Coal Co.*, 11 BLR 1-58, 1-60 (1988); *Niccoli v. Director, OWCP*, 6 BLR 1-910, 1-912 (1984). Thus, a finding concerning the length of coal mine employment may be based on many different factors, and one particular type of evidence need not be credited over another type of evidence. *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-9 (1985).

The miner testified at the hearing that he has twenty-six years of coal mine employment. The District Director also found that the miner had twenty-six years of coal mine employment. Based upon my review of the record, I accept the testimony of the claimant and the findings of the District Director as accurate and credit the claimant with twenty-six years of coal mine employment.

Responsible Operator

In order to be deemed the responsible operator for this claim, High Rise Coal Co. must have been the last employer in the coal mining industry for which the claimant had his most recent period of coal mine employment of at least one year, including one day after December 31, 1969. 20 C.F.R. §§ 725.492(a), 493(a). The Social Security records and claimant's employment history forms establish that High Rise Coal Co. was the last employer to meet these conditions. (DX 4, DX 6).

In the miner's prior claim, he testified that the worked for High Rise Coal Company for thirteen months. (DX 1, p. 224). The record contains pay check stubs to support this allegation. (DX 6). According to the state workers' compensation information form, the miner had been employed by High Rise Coal Company for six months as of January 20, 1990. (DX 1, p. 815).

On this date, the miner was injured on the job and received compensation while he was off work due to his injury. (DX 1, p. 225). When a claimant is off work due to a work-related injury and he is carried on the employer's payroll during his absence, the employer cannot excuse itself from liability for the time that the miner is off of work. *Boyd v. Island Creek Coal Co.,* 8 B.L.R. 1-458, 1-459 (1986). Furthermore, a bookkeeper for High Rise Coal Company testified that the claimant began working for the employer "right around the first of October of 1989" and worked there "until about the first of January 1991…." (DX 1, p. 771). Based on my review of the evidence in the record, I find that the miner worked for High Rise Coal Co. for at least one year and find that company is properly designated as the responsible operator.

Modification

Section 725.310 provides that a claimant may file a petition for modification within one year of the last denial of benefits. Modification petitions may be based upon a change in condition or a mistake in a determination of fact. 20 C.F.R. § 725.310(a). An award in a black lung claim may be modified (increased, decreased, or terminated) at the behest of the claimant, employer, or district director upon demonstrating either that (1) a "change in conditions" has occurred, or (2) there was a "mistake in a determination of fact." 20 C.F.R. § 725.310 (2000) and (2001); *King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001) (modification available to employers as well as claimants); *Branham v. Bethenergy Mines, Inc.*, 20 B.L.R. 1-27 (1996) (employer has a right to file a petition for modification). On February 24, 2005, the claimant timely requested modification of the denial dated March 31, 2004 on the grounds that a mistake in determination of fact had occurred. (DX 54).

In deciding whether the prior decision contains a mistake in a determination of fact, I must review all the evidence of record, including evidence submitted since the most recent denial. New evidence, however, is not a prerequisite to modification based upon a mistake of fact. *Nataloni*, 17 BLR at 1-84; *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156, 1-158(1990), *aff'd on recon.* 16 BLR 1-71, 1-73 (1992). *See also O'Keefe v. Aerojet-General Shipyards*, 404 U.S. 254, 257 (1971). Rather, the fact finder is vested "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 257 (1971). In *Consolidation Coal Co. v. Director, OWCP [Worrell]*, 27 F.3d 227 (6th Cir. 1994), the Sixth Circuit adopted the Fourth Circuit's position in *Jessee* that a modification petition need not specify any factual error or change in conditions and, indeed, the claimant may merely allege that the ultimate fact -- total disability due to pneumoconiosis -- was wrongly decided and request that the record be reviewed on that basis. Moreover, the court stated that the adjudicator "has the authority, if not the duty, to reconsider all the evidence for any mistake of fact or change in conditions." Similarly, in *Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739 (6th Cir. 1997), the Sixth Circuit reiterated that, in a claim involving a petition for modification, "the fact-finder has the authority, if not the duty, to rethink prior findings of fact and to reconsider all evidence for any mistake in fact or change in conditions." It noted that the standard for opening the record on modification is "very low." *See also King v. Jericol Mining, Inc.*, 246 F.3d 822 (6th Cir. 2001) (modification is available to claimants and employers).

In the prior denial, the District Director determined that claimant suffered from pneumoconiosis and was totally disabled due to the disease and he was therefore entitled to Black Lung Benefits. Based upon my review of the record as it existed at the time of this decision, I find no mistake of fact, even of the ultimate fact. The evidence submitted since this decision includes hospital records, examination reports, pulmonary function studies, and arterial blood gas studies. Therefore, I will consider whether this evidence, in conjunction with the previously submitted evidence, establishes entitlement to benefits.

Pneumoconiosis and Related Issues

Medical Evidence

X-Ray Reports

In connection with the current request for modification and the miner's claim initially filed in 2003, the following chest x-ray interpretations were submitted:

Exhibit	**Date of X-ray**	**Physician/Qualifications**	**Interpretation**
DX 11	05/13/03	M.N. Patel/B-reader, Board-certified radiologist[3]	2/1
DX 17	05/13/03	P. Wheeler/B-reader, Board-certified radiologist	No evidence of pneumoconiosis
DX 13	09/30/03	B. Broudy/B-reader	1/1
DX 14	10/10/03	A. Dahhan/B-reader	1/2
DX 70	05/19/05	T.M. Jarboe/B-reader, Board-certified radiologist	1/1

The record in the miner's previous claim filed in 1999 contains forty-two x-ray interpretations.[4] Of these, twenty-five were read as negative for pneumoconiosis, and seventeen were read as positive. A detailed summary of these chest x-ray interpretations can be found in the previous decision by the administrative law judge dated January 17, 2001. (DX 1, p. 94).

[3] A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by or on behalf of the Department of Health and Human Services. This is a matter of public record at HHS National Institute for Occupational Safety and Health reviewing facility at Morgantown, West Virginia. (42 C.F.R. § 37.5l) Consequently, greater weight is given to a diagnosis by a "B" Reader. *See Blackburn v. Director, OWCP*, 2 B.L.R. 1-153 (1979). A physician who has been certified in radiology or diagnostic roentgenology by the American Board of Radiology, Inc., or the American Osteopathic Association. *See* 20 C.F.R. § 727.206(b)(2)(III). The qualifications of physicians are a matter of public record at the National Institute of Occupational Safety and Health reviewing facility at Morgantown, West Virginia.

[4] The claimant's has another previous claim filed in 1978. (DX 1). The medical evidence in that claim dates prior to 1978. The Board has held that it is proper to afford the results of recent medical testing more weight over earlier testing. *See Stanford v. Director, OWCP*, 7 B.L.R. 1-541 (granting greater weight to a more recent x-ray); *Coleman v. Ramey Coal Co.*, 18 B.L.R. 1-17 (1993) (granting greater weight to a more recent pulmonary function study); *Schretroma v. Director, OWCP*, 18 B.L.R. (1993) (granting greater weight to a more recent arterial blood gas analysis); *Gillespie v. Badger Coal Co.*, 7 B.L.R. 1-839 (1985) (granting greater weight to a more recent medical report). As the medical evidence in the miner's 1978 claim is over twenty-five years old, I grant greater weight to the newer evidence. Accordingly, I continue to rely on the most recent evidence in making my decision regarding the current request for modification.

Pulmonary Function Studies

The following pulmonary function studies were submitted in connection with the current request for modification and in the miner's 2003 claim:

Exhibit Date	Age Height	Bronch odilator	FEV_1	FVC	MVV	FEV_1 FVC	Tracings	Comments
DX 11	62	No	1.20	3.10	37	39%	Yes	Good cooperation
5/13/03	66"	Yes	1.35	3.23	46	42%	Yes	and understanding
DX 13	63	No	1.00	2.68	31	38%	Yes	Fair cooperation
9/30/03	67"	Yes	1.26	3.23	39	39%	Yes	and fairly good effort
DX 14	63	No	1.19	2.61	41	46%	Yes	Good cooperation
10/10/03	65½"	Yes	1.36	2.92	53	47%	Yes	and comprehension
DX 70	64	No	0.93	2.66	33	35%	Yes	Good cooperation
05/19/05	65½"	Yes	1.11	3.13	47	35%	Yes	and effort

There were seven pulmonary function studies submitted with the miner's 1999 claim. Of the seven studies, six produced FEV_1 values of less than 1.70 and FEV_1/FVC percentages of less than 55%. An administrative law judge reviewed these studies and provided a summary of the results in the previous decision dated January 17, 2001. (DX 1, p. 88).

Blood Gas Studies

Exhibit	Date of Exam	Resting/ Exercise	pCO_2	pO_2
DX 11	05/13/03	Resting	35	69
		Exercise	37	46
DX 13	09/30/03	Resting	37.9	79.1
DX 14	10/10/03	Resting	41.3	74.8
		Exercise	39.5	69.3
DX 70	05/19/05	Resting	43.4	71.6

In the miner's 1999 claim, there were five arterial blood gas studies submitted. The pCO_2 values ranged from 36.2 to 40.8. The pO_2 values ranged from 61 to 91.1. (DX 1, p. 89).

Treatment Records

The claimant was treated by Dr. Glen Baker on several occasions between September 13, 1999 and May 16, 2005. (DX 74). The progress notes from these treatments are included as part of the record in the current claim. The miner was treated for symptoms involving his respiratory systems and other chest symptoms. Several pulmonary function studies and chest x-rays were

performed and Dr. Baker diagnosed the miner with coal workers' pneumoconiosis and chronic obstructive pulmonary disease. (DX 74).

Medical Reports

Donald L. Rasmussen, M.D., examined claimant on May 13, 2003, at which time he took a patient history of symptoms and an employment history of thirty plus years of coal mine employment. (DX 11). The physician noted the miner had a history of shortness of breath, chronic productive cough, and paroxysmal nocturnal dyspnea attacks. The miner told the physician he began smoking at the age of thirty in 1970, and smoked up to one pack of cigarettes per day, but currently didi not smoke on a daily basis. (DX 11). In addition, Dr. Rasmussen performed a chest x-ray, pulmonary function test, and arterial blood gas study. The physician noted that the chest x-ray was positive for coal miners' pneumoconiosis, and the ventilatory function studies revealed severe obstructive ventilatory impairment. Dr. Rasmussen opined that the studies indicated very marked loss of lung function and that the miner did not retain the pulmonary capacity to perform his last regular coal mine job. Given the significant history of exposure to coal dust, Dr. Rasmussen stated "[i]t is medically reasonable to conclude the patient has coal workers' pneumoconiosis which arose from his coal mine employment." (DX 11). According to the physician, cigarette smoking also contributed to the patient's disabling lung disease, but the coal dust exposure is somewhat more significant since the patient has pronounced impairment in oxygen transfer exceeding his loss of ventilatory function. (DX 11).

The miner was seen in consultation on September 30, 2003 by Dr. Bruce Broudy, who is board-certified in internal medicine and pulmonary disease. (DX 13). The physician noted that the miner, at the time of the consultation, was a sixty-three year old male who worked as an underground coal miner for thirty-one years. (DX 13). He noted the claimant was an ex-smoker who stated he smoked one pack of cigarettes per day for about thirty-five years before quitting "about a year ago." (DX 13). During the examination, the miner complained of coughing, sputum production, wheezing, and dyspnea on exertion walking short distances. Upon physical examination, the miner appeared to be well-developed and in no apparent distress. The breath sounds were noted as markedly diminished. The spirometry test was interpreted as showing severe obstruction with significant improvement after bronchodilation. He added that even after bronchodilation, there was still very severe obstruction. The arterial blood gas study was reported as normal and the physician categorized the chest x-ray as Category 1/1. He found no large opacities or pleural disease. Dr. Broudy diagnosed the miner with simple coal workers' pneumoconiosis and severe chronic obstructive airway disease due to pulmonary emphysema. In his opinion, the miner did not retain the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous manual labor. (DX 13). He attributed the cause of the impairment as severe chronic obstructive airway disease due to cigarette smoking. He explained the responsiveness to bronchodilation by the miner suggested an "asthmatic component." (DX 13).

A deposition of Dr. Broudy was taken on November 24, 2003, where he further reiterated the opinions provided in his medical report. (DX 15). In addition, he stated the basis for his opinion that the miner is not impaired by pneumoconiosis is the fact that the miner has early

simple pneumoconiosis and his predominant physiological impairment obstructive, which is the classical type associated with cigarette smoking.

On October 23, 2003, the miner visited Abdulkader Dahhan, M.D., board-certified in internal medicine and pulmonary diseases. The physician noted claimant worked thirty years in underground coal mine employment. Claimant told the physician that he started smoking one pack of cigarettes per day at age twenty-eight and quit at the age of sixty-two. Upon physical examination, Dr. Dahhan found claimant's chest showed increased AP diameter with reduced air entry to both lungs. Scattered bilateral expiratory ronchi and wheeze were audible. Dr. Dahhan also performed a chest x-ray, pulmonary function tests and arterial blood gas studies on the miner. He stated the spirometry showed a moderately severe obstructive ventilatory defect with "partial reversibility after the administration of bronchodilators." (DX 14). He found the chest x-ray showed mixed opacities consistent with simple coal workers' pneumoconiosis. Based on the occupational, clinical, radiological , and physical evaluation of the miner, Dr. Dahhan diagnosed claimant with simple coal workers' pneumoconiosis and partially reversible obstructive ventilatory defect. He opined that from a respiratory standpoint, the miner does not retain the physiological capacity to continue his previous coal mining work or job of comparable physical demand. (DX 14). However, according to Dr. Dahhan, the miner's pulmonary disability is a result of his lengthy smoking habit with no evidence of pulmonary disability caused by, contributed to, or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. (DX 14).

The record also includes a deposition of Dr. Dahhan taken on December 30, 2003. (DX 16). Dr. Dahhan reiterated the findings in his report and further testified that he is able to distinguish between the effects of coal workers' pneumoconiosis and cigarette smoking because the "amount of pneumoconiosis that's reported is not sufficient to cause significant airway obstruction or pulmonary disability of the nature seen…." (DX 16).

At the request of the employer, the miner was examined by Dr. Thomas M. Jarboe on May 19, 2005. Dr. Jarboe is board-certified in internal medicine and pulmonary diseases. He recorded an occupational history in the underground coal mines of thirty-one years. (DX 70). The miner stated that he becomes short of breath on climbing six steps and has to walk on level ground or he will develop dyspnea. He complained that he coughs daily and raises one or two tablespoons of mucus every twenty-four hours. He reported that he began smoking at age twenty-six or twenty-seven and consumed one package of cigarettes per day before quitting at age sixty. Dr. Jarboe heard some coarse ronchi which tended to clear up with cough. He also found there was some clubbing of the digits, but no edema. The chest x-ray was interpreted as Category 1/1, simple coal worker's pneumoconiosis. The spirometry suggested to the physician mild restriction and indicated very severe obstruction, but there was significant response to bronchodilation agents. The blood gases were found to show no abnormality. Based on these findings, Dr. Jarboe diagnosed the miner with chronic bronchitis, severe pulmonary emphysema, probable bronchial asthma, and probable interstitial lung disease. Dr. Jarboe did not find sufficient evidence to make a diagnosis of coal worker's pneumoconiosis. Although the chest x-ray was classified as 1/1 showing simple pneumoconiosis, it is Dr. Jarboe's "reasoned opinion that the interstitial markings present in this case are not due to dust inhalation but rather, to another cause." (DX 70). He based this opinion of the type and distribution of the opacities

present and the fact that the distribution is in the middle and lower lung zones, atypical for pneumoconiosis which usually starts in the upper zones. Dr. Jarboe found that the pulmonary function tests were not typical of pneumoconiosis. He explained the miner does have a severe ventilatory impairment, caused by cigarette smoking. The physician added that the miner is totally and permanently disabled from a respiratory standpoint, but Dr. Jarboe did not opine that this disability has been caused by, aggravated by or substantially contributed to by the inhalation of coal dust or the present of pneumoconiosis. (DX 70).

Dr. Glen Baker, board certified in internal medicine and pulmonary disease, submitted a medical report dated June 25, 2005. Dr. Baker has been the miner's treating physician for approximately five and a half or six years. The physician noted that the miner has a history of coal dust exposure for thirty-one years. The miner's chest x-rays show evidence of coal workers' pneumoconiosis, which Dr. Baker has read on various times from 1/0 to 1/1. His pulmonary function studies show a severe obstructive defect. Based on the history of coal dust exposure and positive x-ray results, Dr. Baker diagnosed the miner with clinical and legal pneumoconiosis. Dr. Baker found no evidence of clubbing in the miner's digits nor did he hear any fine rales or any indication of any abnormality except for diminished breath sounds. The physician has seen the miner on multiple occasions but never heard any expiratory wheezing or rales. Dr. Baker "strongly feels that [the miner] has obstructive airway disease, Coal Workers Pneumoconiosis and chronic bronchitis and that his condition has been caused almost equally by his cigarette smoking and coal dust exposure." According to Dr. Baker, the miner is totally and permanently disabled from his employment in the coal mine industry or any other work requiring physical exertion. (DX 74).

The miner's 1999 claim contains six medical reports submitted by highly qualified doctors. Of the six physicians, five opined that the miner did not suffer from pneumoconiosis, five opined that the miner was totally disabled, and five opined that the total disability was not due to pneumoconiosis. A detailed summary of the medical reports can be found in the previous decision by an administrative law judge dated January 17, 2001. (DX 1, p. 96).

Discussion

Because the claim at issue was filed after March 31, 1980, and after January 19, 2001, the effective date of the current regulations, the current regulations at 20 C.F.R. Parts 718 and 725 apply. 20 C.F.R. §§ 718.2 and 725.2 (2005). Under this part of the regulations, claimant must establish by a preponderance of the evidence that he has pneumoconiosis, that his pneumoconiosis arose from coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. Failure to establish any of these elements precludes entitlement to benefits. *See Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111, 1-112 (1989). As noted above, upon my review of the evidence as it existed at the time of the prior denial, I have found no mistake of fact. Therefore, I will review the newly-submitted evidence in conjunction with the prior evidence to determine if it supports entitlement to benefits.

The Act defines "pneumoconiosis" as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment." 30 U.S.C. § 902(b). Section 718.202(a) provides four methods for determining the existence of

pneumoconiosis. Under Section 718.202(a)(1), a finding of pneumoconiosis may be based upon x-ray evidence. When evaluating interpretations of miners' chest x-rays, an administrative law judge may assign greater evidentiary weight to readings of physicians with superior qualifications. 20 C.F.R. § 718.202(a)(1); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). The Benefits Review Board and the Sixth Circuit Court of Appeals have approved attributing more weight to interpretations of "B" readers because of their expertise in x-ray classification. *See Warmus v. Pittsburgh & Midway Coal Mining Co.* 839 F.2d 257, 261, n.4 (6th Cir. 1988); *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773, 1-776 (1984). A "B" reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successfully completing an examination conducted by or on behalf of the Department of Health and Human Services. *See* 42 C.F.R. § 37.51(b)(2). Interpretations by a physician who is a "B" reader and is certified by the American Board of Radiology may be given greater evidentiary weight than an interpretation by any other reader. *See Woodward v. Director, OWCP*, 991 F.2d 314, 316 n.4 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984).

The record in the current request for modification and in the claim filed in 2003 contains five interpretations of four chest x-rays. Of these interpretations, one is negative for pneumoconiosis while five are positive. In the miner's 1999 claim, forty-two chest x-rays were submitted and the majority of these were read as negative. Because pneumoconiosis is a progressive disease, I may properly accord greater weight to the interpretations of the most recent x-rays, especially where a significant amount of time separates the newer from the older x-rays. I also may assign heightened weight to the interpretations by physicians with superior radiological qualifications. *See McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc).

Dr. P. Wheeler is the only physician in the most recent claims to interpret the chest x-ray as negative for pneumoconiosis. This same chest x-ray was read by Dr. M.N. Patel as positive for pneumoconiosis. Both Drs. Patel and Wheeler are qualified B-readers and board-certified radiologists. However, another B-reader and board-certified radiologist, Dr. T.M. Jarboe, read the May 19, 2005 x-ray as positive for pneumoconiosis, which is in agreement with the interpretations of two separate x-rays by B-readers Drs. Broudy and Dahhan. Because the positive readings constitute the majority of the most recent interpretations and are verified by more highly-qualified physicians, I find that the x-ray evidence is positive for pneumoconiosis under Section 718.202(a)(1).

Under Section 718.202(a)(2), a claimant may establish pneumoconiosis through biopsy evidence. This section is inapplicable herein because the record contains no such evidence.

Under Section 718.202(a)(3), a claimant may prove the existence of pneumoconiosis if one of the presumptions at Sections 718.304 to 718.306 applies. Section 718.304 requires x-ray, biopsy, or equivalent evidence of complicated pneumoconiosis. Because the record contains no such evidence, this presumption is unavailable. The presumptions at Sections 718.305 and 718.306 are inapplicable because they only apply to claims that were filed before January 1, 1982, and June 30, 1982, respectively. Because none of the above presumptions applies to this claim, claimant has not established pneumoconiosis pursuant to Section 718.202(a)(3).

Section 718.202(a)(4) provides the fourth and final way for a claimant to prove that he has pneumoconiosis. Under this section, a claimant may establish the existence of the disease if a physician exercising reasoned medical judgment, notwithstanding a negative x-ray, finds that he suffers from pneumoconiosis.

In the most recent claim and request for modification, the miner was examined by five well-qualified physicians. Of these five physicians, only one, Dr. Jarboe, opined that the miner does not suffer from pneumoconiosis. In the miner's 1999 claim, the majority of the physicians opined that the miner did not suffer from pneumoconiosis. However, as mentioned previously, pneumoconiosis is a progressive disease and I am entitled to give less weight to older medical opinions. The conflicting medical opinions must be weighed to resolve the contrary conclusions. All provided at least some rationale in support of their conclusions. Thus, I consider all of these medical opinions to represent documented and reasoned medical opinions.

After weighing all of the medical opinions of record, I resolve this conflict by according greater probative weight to the opinions of Drs. Rasmussen, Broudy, Dahhan, and Baker. All of these physicians possess excellent credentials in the field of pulmonary disease. I also find their reasoning and explanation in support of their conclusions more complete and thorough than that provided by the physicians who concluded that the claimant does not suffer from pneumoconiosis. I also find the opinions of these physicians to be in better accord both with the evidence underlying their opinions and the overall weight of the medical evidence of record. Therefore, the claimant also has established he suffers from pneumoconiosis per Section 718.202(a)(4).

Because the claimant has established over ten years of coal mine employment, he is entitled to a rebuttable presumption that his pneumoconiosis arose from coal mine employment. *See* 20 C.F.R. § 718.203(b). This presumption may be rebutted by evidence demonstrating another cause for claimant's pneumoconiosis. The employer has proferred no evidence to show another cause for claimant's pneumoconiosis. Accordingly, I find that the claimant's pneumoconiosis arose from coal mine employment.

In sum, the evidence establishes that the claimant has pneumoconiosis and that his pneumoconiosis arose out of coal mine employment. In order to establish entitlement to benefits, however, the evidence also must establish that the claimant is totally disabled due to pneumoconiosis.

In addition to showing that he suffers from pneumoconiosis, the miner must also establish that he is totally disabled due to the disease. A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 C.F.R. § 718.304 (2005), or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR § 718.204(b) and (c) (2005). The regulations provide five methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; (4) reasoned medical opinion; and (5) lay testimony. 20 C.F.R. § 718.204(b) and (d)

(2005). Lay testimony may only be used in establishing total disability in cases involving deceased miners, and in a living miner's claim, a finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony. 20 C.F.R. § 718.204(d) (2005); *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-106 (1994). There is not sufficient evidence in the record to show that the claimant suffers from complicated pneumoconiosis or cor pulmonale. Thus, I will consider the pulmonary function studies, blood gas studies and medical opinions.

The record in the most recent claim contains four pulmonary function studies. All of these studies produced qualifying values.[5] In the miner's previous claims, six of the seven submitted pulmonary function studies produced qualifying values. The vast majority of the pulmonary function studies produced qualifying values. Therefore, I find that claimant has established total disability per Section 718.204(b)(2)(i).

In the most recent claim and request for modification, four blood gas studies were submitted and only one of these produced qualifying values. In the 1999 claim, none of the arterial blood gas studies produced qualifying values. As the majority of the arterial blood gas studies have not produced qualifying values, I find that the miner has failed to establish total disability per Section 718.204(b)(2)(ii). Moreover, as there is no medical evidence of cor pulmonale in the record, I find claimant failed to establish total disability with medical evidence of cor pulmonale under the provisions of Section 718.204(b)(2)(iii).

The final way to establish a totally disabling respiratory or pulmonary impairment under Section 718.204(b)(2) is with a reasoned medical opinion. The opinion must be based on medically acceptable clinical and laboratory diagnostic techniques. *Id*. A claimant must demonstrate that his respiratory or pulmonary condition prevents him from engaging in his "usual" coal mine employment or comparable and gainful employment. 20 C.F.R. § 718.204(b)(2)(iv). A finding that the miner should limit further exposure to coal mine dust does not constitute a finding of disability pursuant to the regulations or case law. *See Zimmerman v. Director, OWCP*, 871 F2d 564, 567 (6th Cir. 1989). The weight given to each medical opinion will be in proportion to its documented and well-reasoned conclusions. In assessing total disability, the administrative law judge, as the fact-finder, is required to compare the exertional requirements of the claimant's usual coal mine employment with a physicians' assessment of the claimant's respiratory impairment. *Budash v. Bethlehem Mines Corp.,* 9 B.L.R. 1-48, 1-51.

The newly submitted physicians' reports and reports from the 2003 claim are summarized above. All of the physicians that examined the miner opined that he could not do the work of a coal miner or a similar position. (DX 11, DX 13, DX 14, DX 70, DX 74). Similarly, five of the six physicians who examined the miner in his 1999 claim also opined that the claimant is totally disabled. (DX 1). As the majority of the physicians have opined that the miner is totally disabled, I find that the miner has established total disability per Section 718.204(b)(2).

[5] A qualifying pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values found in Appendices B and C of Part 718. *See* 20 C.F.R. § 718.204(b)(2)(i) and (ii). A non-qualifying test produces results that exceed the table values.

Finally, claimant must also establish that his total disability is due to pneumoconiosis. 20 C.F.R. § 718.204(b). To satisfy this requirement, the United States Court of Appeals for the Sixth Circuit requires a claimant to prove that his totally disabling respiratory is due "at least in part" to his pneumoconiosis. *Adams v. Director, OWCP*, 886 F.2d, 818, 825 (6th Cir. 1989). This means the miner "must affirmatively establish that pneumoconiosis is a contributing cause of some discernable consequence to his totally disabling respiratory impairment. The miner's pneumoconiosis must be more than merely a speculative cause of his disability." *Peabody Coal Co. v. Smith,* 127 F.3d 504, 507 (6th Cir. 1997). In reviewing the medical opinion evidence regarding etiology, opinions wherein the physicians did not diagnose the miner as suffering from pneumoconiosis may be accorded little probative value. *See Toler v. Easter Assoc. Coal Co.,* 43 F.3d 109 (4th Cir. 1995).

The qualifications of the physicians are relevant in assessing the respective probative values to which their opinions are entitled. *Burns v. Director, OWCP*, 7 B.L.R. 1-597, 1-599 (1984). More weight may be accorded to the conclusions of a treating physician as he or she is more likely to be familiar with the miner's condition than a physician who examines him episodically. *Onderko v. Director, OWC*P, 14 B.L.R. 1-2, 1-6 (1989). However, a judge "is not required to accord greater weight to the opinion of a physician based solely on his status as the claimant's treating physician. Rather, this is one factor which may be taken into consideration in … weighing … the medical evidence …." *Tedesco v. Director, OWCP*, 18 B.L.R. 1-103, 1-105 (1994). Factors to be considered in weighing evidence from treating physicians include the nature and duration of the relationship, and the frequency and extent of treatment. In appropriate cases, a treating physician's opinion may be give controlling weight, provided that the decision to do so is based on the credibility of the opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 CFR § 718.104(d) (2005). The Sixth Circuit has interpreted this rule to mean that

> in black lung litigation, the opinions of treating physicians get the deference they deserve based on their power to persuade. … For instance, a highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference, whereas a treating physician without the right pulmonary certifications should have his opinions appropriately discounted. The case law and applicable regulatory scheme make clear that ALJs must evaluate treating physicians just as they consider other experts.

Eastover Mining Co. v. Williams, 338 F.3d 501, 513 (6th Cir. 2003) (citations omitted).

In this case, the claimant identified Dr. Glen Baker as his current treating physician. Dr. Baker is highly qualified in the area of pulmonary diseases and he has a lengthy experience with the miner. Dr. Baker, along with Dr. Rasmussen, opined that the miner suffers from pneumoconiosis and he is totally disabled due to the disease. Drs. Broudy, Dahhan, and Jarboe do not opine that the miner is totally disabled due to pneumoconiosis. However, the opinion of Dr. Jarboe is entitled to little weight because he did not diagnose the miner as suffering from pneumoconiosis, and I have found that the evidence supports the existence of the disease.

In weighing these conflicting medical opinions, I give greater deference to the opinion of Dr. Baker. He is the miner's treating physician and has had the opportunity to examine him on

numerous occasions. His opinion is well supported in light of the miner's extensive coal mine employment and the results of the objective testing and physical examinations. The majority of the physicians in the miner's 1999 claim did not find that the miner's disability was due to pneumoconiosis, but I am entitled to give those opinions less weight than the opinions in the most recent claim. Therefore, I find that the miner has established that his total disability is due to pneumoconiosis.

In conclusion, the newly submitted evidence, when considered in conjunction with the evidence in the prior claims, establishes that claimant suffers pneumoconiosis and he is totally disabled from the disease. I find that there has been no mistake in a determination of fact. Accordingly, the employer's request for modification must be denied.

Dependents

A claimant's award of benefits under Part C of the Act should be augmented on behalf of the following dependents who meet the conditions of relationship set out in the regulations: (1) spouse; (2) divorced spouse; or (3) child. 20 C.F.R. § 725.210 (2000) and (2001). For the miner's benefits to be supplemented because of any of these relationships, the individual must qualify under both a relationship test and a dependency test.

The miner claims one dependent, his wife, for purposes of augmentation. An individual satisfies the entitlement condition of the relationship test for miner's spouse set forth at 20 C.F.R. § 725.204(a) if the individual's marriage to the miner would be valid under the laws of the state in which the miner is domiciled. An individual qualifies for the status of dependent spouse if the individual is a member of the same household as the miner, 20 C.F.R. § 725.205(a). In the current case, the miner has submitted evidence that he and his wife were validly married in 1969 (DX 1, p. 1014), and they are currently living in the same household. (DX 3). Therefore, I find that the miner has one dependent for purposes of augmentation.

Liability for Medical Bills

The employer has refused to pay for all medical services of the claimant, arguing that the request for modification excludes them. The claimant filed a medical dispute case with the District Director. (DX 83). However, the issues were not resolved by the District Director. The regulations require payment for medical benefits to commence 30 days after the initial determination of liability by the District Director. 20 C.F.R. § 725.522. Subsections 725.701(e) and (f) have been added under the amended regulations and is codified as follows:

> (e) If a miner receives a medical service or supply, as described in this section, for any pulmonary disorder, there shall be a rebuttable presumption that the disorder is caused or aggravated by the miner's pneumoconiosis. The party liable for the payment of benefits may rebut the presumption by producing credible evidence that the medical service or supply provided was for a pulmonary disorder apart from those previously associated with the miner's disability, or was beyond that necessary to effectively treat a covered disorder, or was not for a pulmonary disorder at all.

> (f) Evidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis arising out of coal mine employment is insufficient to defeat a request for coverage of any medical service or supply under this subpart. In determining whether treatment is compensable, the opinion of the miner's treating physician may be entitled to controlling weight pursuant to § 718.104(d). A finding that a medical service or supply is not covered under this subpart shall not otherwise affect the miner's entitlement to benefits.

20 C.F.R. § 725.701(e) and (f) (2001).

In *Cornett v. Arch of Kentucky, Inc.*, BRB No. 01-0276 BLA (Nov. 28, 2001) (unpub.), a case arising in the Sixth Circuit, the Benefits Review Board upheld the administrative law judge's finding that the miner's hospitalization was related to his coal dust induced lung disease notwithstanding the fact that the records did not specifically "reflect treatment for pneumoconiosis." The administrative law judge noted that the miner's chronic obstructive pulmonary disease and chronic bronchitis had been found to be related to coal dust exposure and, therefore, because his hospitalization records reflected treatment for such a disease, the costs were compensable. Moreover, it was proper to give little weight to another physician's opinion that the medical expenses were not compensable because his opinion was premised on a finding that the miner did not suffer from legal pneumoconiosis.

The claimant has submitted medical bills ranging in date from April 4, 2003 to June 8, 2005 totaling $3,255.20 for prescription medications prescribed by Dr. Glen Baker. This physician explained in his medical report that he treats the miner for his obstructive airway disease and coal workers' pneumoconiosis. (DX 74). Also, a report of Dr. Gary H. Miller dated August 6, 2006 tends to support the conclusion that the medical care in question is reimbursable under the Act. (DX 96).[6] The employer has provided no evidence that the medical expenses are not compensable and has not rebutted the presumption that the miner is entitled to compensation. Therefore, I find that the employer is responsible for the payment of the claimant's fees, charges, and other reasonable expenses submitted by the claimant in connection with the claim.

Attorney's Fee

Claimant's counsel has thirty days to submit an application for an attorney's fee. The application shall be prepared in strict accordance with 20 C.F.R. §§ 725.365 and 725.366. The application must be served on all parties, including the claimant, and proof of service must be filed with the application. The parties are allowed thirty days following service of the application to file objections to the fee application. In the event this decision is appealed, claimant's counsel can elect to withhold the filing of his fee petition pending the appeal.

[6] Since no objections have been filed to this evidence, DX 96 is hereby admitted in evidence.

ORDER

The employer is hereby ORDERED to pay the following:

1. to claimant, all benefits to which he is entitled under the Act, augmented by his reason of his one dependent, commencing on April 1, 2003, which is the beginning of the month in which the most recent claim was filed;

2. to claimant, all medical and hospitalization benefits to which he is entitled, commencing April 1, 2003;

3. to the Secretary of Labor, reimbursement for any payment the Secretary has made to claimant under the Act. The employer may reduce such amounts, as appropriate, from the amounts the employer is ordered to pay under paragraph 1 above; and,

4. to the Secretary of Labor or to claimant, as appropriate, interest computed in accordance with the provisions of the Act or regulations.

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DONALD W. MOSSER
Administrative Law Judge

Notice of Appeal Rights: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with Board within thirty (30) days from the date of which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* C.F.R §802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).